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# Supreme Court of the United States

October Term, 1931

No. 700

JOHN H. PAGE, TRUSTEE

*Petitioner*

*v.*

ARKANSAS NATURAL GAS CORPORATION

*Respondent*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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*May it please the Court:*

The nature of this case and the proceedings had therein are correctly stated in Paragraph I of the petition for certiorari herein.

While, as stated in Paragraph II of the petition, the facts are undisputed, we cannot agree that certain inferences drawn by the petitioner are correct.

Both Courts below have found the facts in favor of the respondent and we rely upon the statement of facts con-

tained in the opinion of the Circuit Court of Appeals (53 Fed. 2d Series 27, Advance Sheet No. 1, December 21, 1931).

The questions of law presented by the petition depend upon the contention of the petitioner that H. M. Barney, as Trustee in Bankruptcy of Harry Morris and Harry Morris Guaranteed Gusher Syndicate No. 3 sold to Natural Gas & Fuel Corporation, respondent's predecessor, a certain oil lease which was not a part of the bankrupt's estate. The petitioner's contention in this respect is summarized under Paragraph III, page 9, of the petition; and the several questions of law propounded in Paragraph III of the petition depend upon this understanding of the facts. We submit that the lease sold to respondent's predecessor was a part of the bankrupt estate and that title to the lease vested in the Trustee in Bankruptcy by operation of law, as was held by the Circuit Court of Appeals, and that the Trustee had full power to convey the same. The relationship between Mike Lyvers Syndicate and Harry Morris Guaranteed Gusher Syndicate No. 3 is explained in the opinion of the Circuit Court of Appeals, 53 Fed. 2d Series 27 at page 29.

At the time of the organization of Mike Lyvers Syndicate, Mike Lyvers was a young man about twenty-one years old (Tr. p. 136) and was employed by one of the Morris organizations, working by the day. The transcript (pp. 140 and 141) contains the testimony of Lyvers himself at a hearing on a claim for salary filed by him. He stated that he had worked for Harry Morris since May, 1922; that he was Trustee of Mike Lyvers Syndicate in name only; that the business of the Syndicate was handled

by Harry Morris and that the Mike Lyvers Syndicate, Harry Morris Guaranteed Gusher Syndicate No. 3, and the various other syndicates were as a whole just one organization and were all controlled by the Morrises. The Circuit Court of Appeals so found (53 Fed. 2d Series 27 at page 38).

The contentions of the petitioner based upon the assumption that the case is one where a Trustee in Bankruptcy claimed the right to the possession of property owned or claimed in good faith by a third party, are untenable because no such case is presented. Mike Lyvers Syndicate, while in form a separate entity, was in fact, as we have shown, part and parcel of the promotion schemes conducted by the Morris Brothers, and the leases held by Lyvers Syndicate were part of the estate of the bankrupt.

In answer to the points raised by the petitioner we submit the following:

## I

**The decision of the Circuit Court of Appeals on the appeal from the decree dismissing the bill was not the law of the case upon the trial on the merits.**

After this cause was removed from the Chancery Court of Union County, Arkansas, to the United States District Court for the Western District of Arkansas, the defendant (respondent's predecessor) moved to dismiss the bill upon the ground that the same failed to state a cause of action and the District Court granted the motion.

The motion to dismiss, of course, was in the nature of a demurrer and admitted all facts well pleaded. But the Circuit Court of Appeals on that appeal had before it the single question whether the facts stated in the bill, if taken as true, showed a cause of action.

As to this single proposition the bill set forth that Mike Lyvers Syndicate was a separate and distinct entity; that the Morris Guaranteed Gusher Syndicate No. 3 had no right, title or interest in or to the leases standing in the name of Mike Lyvers Syndicate; that in the intervention proceedings instituted by Mike Lyvers he appeared in his personal capacity only and not as Trustee; that the order made by the Referee and affirmed by the District Court affected Mike Lyvers in his personal capacity only and not as Trustee. All that the Court of Appeals could properly decide was the single, limited question whether the facts pleaded in the bill constituted a cause of action. If on the face of the bill it appeared that the lease conveyed by the Trustee in Bankruptcy to respondent's predecessor was not a part of the bankrupt estate and had not legally been conveyed to the Trustee in Bankruptcy, but that nevertheless the Trustee in Bankruptcy had sold and transferred said lease, a cause of action in favor of the Trustee of Mike Lyvers Syndicate might be stated. Whether such was the case was the only question before the Circuit Court of Appeals, and the effect of the decision was limited to the precise point necessary for a decision.

*Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 291;
*Vicksburg* v. *Henson*, 231 U. S. 259, 269.

After the defendant (respondent's predecessor) pleaded over, the ruling on the appeal from the decree dismissing the bill was ineffective for any purpose unless the trial on the merits developed no more than the precise facts alleged in the bill and considered by the Court when ruling on the motion to dismiss.

An entirely different situation has been developed by the evidence introduced at the trial.

If the argument on pages 18 to 22 of the petitioner's brief be understood as intimating that the only "additional evidence" before the Court of Appeals on the second appeal were the two instruments annexed to defendant's answer as Exhibits "B" and "C," it is completely refuted by what follows.

It now appears that Mike Lyvers acted as Trustee of Lyvers Syndicate only ostensibly. It now appears:

> "Credit for carrying on the operations of the Lyvers Syndicate was extended either to the Gusher Syndicate or to the Morrises. Bills for the operation of the producing properties in the name of Mike Lyvers, Trustee, were paid by checks of the Gusher Syndicate and of the Morris Drilling Company. Some reimbursements were made by the Lyvers Syndicate to the Gusher Syndicate or the Morrises for expenses incurred. However, the checks therefor were drawn by the Morrises themselves. The evidence shows that from the time the Lyvers Syndicate was created its moneys and properties were administered by the Morrises in connection with their administration of the affairs of the Gusher Syndicate. Lyvers as Trustee had no credit extended to him—he was merely a straw man. In his testimony taken on intervention at an earlier date when he was claiming salary

> he testified that he was a mere employe of the Morrises, and that the Lyvers Syndicate and the Gusher Syndicate were operated as one organization, that he had no interest whatever in the property of the Lyvers Syndicate; and the testimony of Barney was that Lyvers disclaimed to him any ownership or interest in the property. Lyvers testified that the property, referring to that owned by the Mike Lyvers Syndicate, was really owned by the Harry Morris Guaranteed Gusher Syndicate No. 3; that he was trustee in name only, and that Harry Morris handled the business'' (53 Fed. 2d. 27, 38).

It further appears that the unit holders of the Mike Lyvers Syndicate themselves treated the assets of that Syndicate as part of the bankrupt estate. A Reorganization Committee was formed by the unit holders in the various Syndicates, including unit holders in Mike Lyvers Syndicate, and this Committee instituted the bankrtuptcy proceedings against the Morris Guaranteed Gusher Syndicate (53 Fed. 2d. 27, 29). Mr. H. M. Barney ''took actual possession of the various properties of the Gusher Syndicate and the producing leases of the Lyvers Syndicate, and as to the Bilyou Lease he put up placards on the property stating that it was in his possession as Receiver of the Federal Court'' (53 Fed. 2d. 27, 29).

> ''Meetings of unit holders of the Lyvers Syndicate were held throughout the United States, at which they were informed that the properties of the Lyvers Syndicate had been taken over by the Trustee in Bankruptcy of the Gusher Syndicate. In January, 1924, the Reorganization Committee mailed to the unit holders a form of proof of claim in bankruptcy to be used by them in filing their claims as creditors

in the matter of the Gusher Syndicate and Harry Morris, Bankrupts. This Committee organized the Moco Oil Corporation, the purpose of which was to acquire the Morris properties. The unit holders were constantly advised of the situation by the publication and distribution of a paper called 'The Moco News.' In one copy it listed properties which the Moco Oil Corporation intended to buy from the Trustee in Bankruptcy, and this list included the Bilyou Lease. In February, 1924, Mike Lyvers filed an intervention before the Referee in Bankruptcy claiming certain property taken by the Trustee in Bankruptcy, among which was the Bilyou Lease. February 15, 1924, the Trustee filed response, admitting possession of the property, and claiming it as Trustee in Bankruptcy, and denying ownership in Lyvers, and asking for a summary order directing Lyvers to execute a quit claim deed conveying certain leases of the Lyvers Syndicate to him as Trustee, alleging that said leases were purchased with moneys and assets of the bankrupt estate, and that they were held by Lyvers only as Trustee for the benefit of said estate. The matter was heard by the Referee, who held that Lyvers had no interest in this property and that all the property of the Gusher Syndicate and the Lyvers Syndicate belonged to a common fund" (53 Fed. 2d. 27, 29 and 30).

In October, 1924, the Referee in Bankruptcy mailed to the unit holders of the Lyvers Syndicate a notification to file their claims in bankruptcy as creditors of the estate and the unit holders representing more than ten thousand units filed their claims in the Gusher Syndicate bankruptcy proceedings. These claims were allowed and a dividend of two and one-half cents per unit was paid (53 Fed. 2d. 27, 30).

Thus the real situation is vastly different from that shown by the allegations of the bill which were admitted for the purposes of the motion to dismiss and which only could have been considered by the Circuit Court of Appeals on the first appeal.

The question before the Circuit Court of Appeals on the first appeal was simply whether or not the bill was good as a pleading—whether if the facts stated in such bill were confessed the plaintiff had a cause of action. A general motion to dismiss is equivalent to a demurrer and it is well settled that a ruling on a demurrer is not regarded as binding on the Court in the subsequent course of the litigation.

*Wiggins Ferry Co.* v. *O. & M. Ry. Co.*, 142 U. S. 396, 410;
*John II Estate* v. *Brown*, 201 Fed. 224, 246;
*Ohio River R. R. Co.* v. *Fisher*, 115 Fed. 929, 936;
*Woodard* v. *Outland*, 37 Fed. 2d. 87, 90;
2 Freeman on Judgments (5th Edition) Sections 717, 744 and 745.

There is no contradiction between the decisions of the Circuit Court of Appeals on the first appeal and the second appeal. On the first appeal the Court was considering facts shown by the bill; on the second, facts developed by evidence at the trial which disclosed an entirely different situation.

## II

### The Petitioner's Assignments of Error

Petitioner's assignments of error, set forth on pages 17 and 18 of petitioner's brief, rest upon the erroneous assumption that Mike Lyvers Syndicate was a bona fide separate entity, and that the claim set up by Lyvers in his intervention proceeding was a bona fide adverse claim.

The findings of the Circuit Court of Appeals show beyond question that Mike Lyvers Syndicate was not a bona fide separate entity (53 Fed. 2d. 27, 38 and 39). Under the express provisions of the Bankruptcy Act the Trustee in Bankruptcy took title to the leases held by the Lyvers Syndicate by operation of law and no deed from Lyvers was necessary to vest title in the Trustee. Section 70 of the Bankruptcy Act (U. S. Code Ann., Title 11, Section 110), so far as material, is as follows:

> "§110. SAME; TITLE. (a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor successors, if he shall have one or more, upon his or their appointment and qualification, *shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt,* except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trademarks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5)

property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. When any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

Section 47 of the Bankruptcy Act (U. S. Code Ann., Title 11, Section 75), so far as material, is as follows:

"§75. SAME; DUTIES. (a) Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them on property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; *and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court,* shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied; * * *."

No deed from Lyvers to the Trustee was necessary to pass the title to the Trustee.

*Re: Friedrich*, 100 Fed. 284.

The Trustee took possession of the Lyvers producing leases and posted the lease involved in this case with a notice stating that it was in his possession as an officer of the Federal Court. The Trustee paid the annual rental on the lease. Petitioner's contention that the Bankruptcy Court did not have possession of the lease is unsound. Mike Lyvers Syndicate was not working the lease, and the Trustee by posting notices did everything possible to bring the lease under the jurisdiction of the Bankruptcy Court short of actually drilling and working the property. Where the Bankruptcy Court has possession of the property it has exclusive jurisdiction to hear and determine all questions respecting the title, possession or control of the property.

*Murphy* v. *John Hofman Co.*, 211 U. S. 562, 568.

The contentions of the petitioner that the Court erred in holding that the alleged adverse claim of Lyvers should have been determined in a plenary action is likewise unsound. In the first place, Lyvers selected the Bankruptcy Court as the forum in which to have his claim adjudicated. The Trustee filed opposition to the claim, evidence was taken and the Referee made an order holding that Lyvers had no interest in the property but that all the property of the Gusher Syndicate and the Lyvers Syndicate belonged to a common fund. The District Court affirmed the order of the Referee. No proceedings were taken to review the

order of the District Court. In the second place, the claim of Lyvers as presented in his intervention was not even a colorable adverse claim. Lyvers, as the Court below has found, was a straw man. He never had any individual interest in the Bilyou Lease but he did claim it in his intervention petition.

The Circuit Court of Appeals in its opinion speaks of "the almost complete acquiescence by the unit holders in the administration of the Lyvers property as part of the bankrupt estate," and continues:

> "The bankruptcy proceedings as to the Gusher Syndicate were started by Dr. McComb representing unit holders of both syndicates. The unit holders were advised early in 1924 that the properties of both syndicates were being administered by the bankruptcy court, and two-thirds of the unit holders of the Lyvers Syndicate filed claims in the bankruptcy proceedings of the Gusher Syndicate as creditors thereof."

Under such circumstances Lyvers' intervention petition did not present even a colorable adverse claim and the Bankruptcy Court had jurisdiction to make a preliminary inquiry to determine whether such claim was real and substantial, or merely colorable.

In *Harrison* v. *Chamberlin*, 271 U. S. 191, this Court said:

> "*However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but, having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine*

*whether the adverse claim is real and substantial or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily;* but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceeding."

We submit that the procedural questions referred to in the assignments of error were correctly decided by the lower courts.

**WHEREFORE, it is respectfully submitted that the application for a writ of certiorari should be denied.**

Respectfully,

ROBERT S. SLOAN,
*Counsel for Respondent.*